

ST 98-40

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

"F. LEGHORN III",

Taxpayer

No. 98-ST-0000
IBT No.: 0000-0000
NPL No.: 0000

Charles E. McClellan
Administrative Law Judge

RECOMMENDATION FOR DECISION

Synopsis:

This matter came on for evidentiary hearing following the filing of a timely protest to a Notice of Penalty Liability ("NPL") issued by the Department of Revenue ("Department") on August 24, 1994, to "F. Leghorn, III" ("Leghorn"). "Leghorn" appeared *pro se*. The NPL, in the amount of \$32,776.81, was issued to "Leghorn" as a responsible officer of "F. Leghorn & Sons, Inc." ("FLS"), a corporation located at (Street address). The issue is whether "Leghorn" is liable, as a responsible person, for the penalty assessed him under section 13 ½ of the Retailers' Occupation Tax Act. ("ROTA") Ill. Rev. Stat. 1991, ch. 120, ¶ 452½.¹

Following the submission of all evidence and a review of the record, I recommend that the Department's NPL be made final.

Findings of Fact:

1. "FLS" was incorporated in Illinois on September xx, 19xx. Dept. Ex. No. 2.
2. During all relevant times, "Leghorn" was the secretary of the corporation. *Id.*, Tr. p. 7.

¹ Ill. Rev. Stat. 1991, ch. 120, ¶ 452½, was repealed effective January 1, 1994. It was replaced by § 3-7 of the Uniform Penalty and Interest Act, 35 ILCS 735/7. "Leghorn's" liability in this case is determined under the § 13½ of ROTA, the law in effect during 1991 when the tax was incurred. Musa Sweis v. Department of Revenue, 269 Ill. App. 3d 1, 645 N.E. 2d 972 (1st Dist. 1995).

3. During the audit period "Leghorn's" father was president of "FLS". *Id.*
4. "FLS" was in the business of selling building products at wholesale and retail. Tr. p. 21.
5. The company also manufactured wood products, including doors, windows, molding and trim. *Id.*
6. The Department issued NPL No. 0000 to "Leghorn" as a responsible officer of "FLS" on August xx, 19xx, for unpaid retailers' occupation (*i.e.*, sales) tax, penalty and interest for the months of July, August, September and October of 1991. Dept. Ex. No. 1.
7. "Leghorn" was employed by "FLS" and had check signing authority for the "FLS" account. Tr. pp. 6, 7.
8. During the audit period "Leghorn" received wages from "FLS". Tr. p. 7.
9. "Leghorn's" father determined the order of debt payment for "FLS" during the audit period. *Id.*
10. During the audit period "Leghorn" authorized the payment of withholding taxes, insurance, employee wages and other expenses. Tr. pp. 8, 9.
11. During the audit period "Leghorn" signed some of the sales tax returns. Tr. p. 10, Dept. Exs. No. 2, 3.
12. "FLS" had financial difficulties and ended up in Chapter 11 bankruptcy proceedings. Tr. pp. 16, 17, 18.

Conclusions of Law

The issue in this case is whether "Leghorn" is a responsible person who willfully failed to file and pay sales taxes for "FLS" as required by statute, and is, therefore, personally liable for the penalty imposed by section 13½ of the Retailers Occupation Tax Act ("Act").

Once the Department introduced into evidence the NPL under the Director's certificate (Dept. Ex. No. 1), its *prima facie* case was made. Branson v. Dept. of Revenue, 168 Ill.2d 247 (1995) By operation of the statute, proof of the correctness of the penalty, including the willfulness element of the statute was established. *Id* at p. 260. At that point in the proceedings, "Leghorn" had the burden of proving that the penalty did not apply to him. *Id.* at p. 261. The record shows that he failed to do so.

ROTA Section 13 ½, in relevant part, provided as follows:

(a) Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully

fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceedings by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue.

Whether "Leghorn" is liable for the tax depends in the first instance on whether he is a responsible person under the statute. In applying the penalty tax, the Illinois courts look to federal cases involving § 6672 of the Internal Revenue Code² which contains language similar to the Illinois statute. Branson, *supra*. The fact that a person was an officer of a corporation does not, *per se*, mean that he was the person who had the duty to collect, account for and pay over the tax. Monday v. U.S., 421 F.2d 1210, (7th Cir. 1970), *cert. den.* 400 U.S. 821. However, the fact that another person may have had that responsibility does not mean that the officer was not also responsible. *Id.* The liability attaches to those who have the power and responsibility within the corporation for seeing that tax owed is paid and that responsibility is generally found in high corporate officials charged with general control over corporate business. *Id.* Responsibility is not a matter of knowledge, but rather a matter of status and authority. Mazo v. U.S., 591 F.2d 1151 (5th Cir. 1979)

In the instant case, "Leghorn's" father was president of "FLS" and usually decided which creditors would be paid. However, "Leghorn", was an employee of "FLS", its corporate secretary and he had check signing authority which he exercised on occasion to authorize payment of withholding taxes, insurance, employee wages and other expenses. He also signed sales tax returns during the audit period which were filed showing liability but with no payment being attached. Dept. Exs No. 2, 3. As an employee and secretary of "FLS" and one who authorized payments to creditors, "Leghorn" had the status and authority that made him a responsible person under the statute.

Finding that "Leghorn" was a responsible person, the next question is whether he willfully failed to pay over the retailers' occupation tax within the meaning of the statute. The concept of willfulness is not defined in the statute. The court in Monday, *supra*, noted that the concept, when used in criminal statutes, requires "bad purpose or the absence of justifiable excuse." *Id.* at p. 1215. The court then distinguished the meaning the term when used in civil actions by saying, "[R]ather, willful conduct denotes intentional, knowing and voluntary acts.

². 26 U.S.C. § 6672.

It may also indicate a reckless disregard for obvious or known risks." *Id.*; Dept. of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977).

The willfulness requirement "is satisfied if the responsible person acts with reckless disregard of a known risk that the trust funds may not be remitted to the Government. . . ." Garsky v. U.S., 600 F.2d 86 (7th Cir. 1979) A high degree of recklessness is not required because if it were required, the purpose of the statute could be frustrated simply by delegating responsibilities within a business and adopting a "hear no evil -- see no evil" policy. Wright v. U.S., 809 F.2d 425 (7th Cir. 1987) A "responsible person is liable if he (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily." *Id.* at 427. Willfulness can be established by showing gross negligence as in a situation in which a responsible party ought to have known of a grave risk of nonpayment and who is in a position to easily find out, but does nothing. Branson, 168 Ill.2d at 255.

In this case, "Leghorn" signed some of the retailers' occupation tax returns, and, according to his own testimony, he sometimes authorized payments to creditors. Thus, he most certainly was aware of the obligation to file and pay retailers' occupation tax to the state. He testified that the taxes weren't paid because "FLS" was having financial difficulties. This testimony indicates that he knew that the sales taxes were not being paid. However, there is no testimony or other evidence that he took any steps to afford the Department priority over other creditors or that he objected to not paying sales tax even though he signed two tax returns.

These factors establish willfulness within the context of the statute and make him liable for the penalty assessed.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notice of Penalty Liability should be made final.

June 23, 1999

ENTER:

Administrative Law Judge